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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Main Building Maintenance, Inc.

File: B-291950; B-291950.2

Date: May 15, 2003

Garreth E. Shaw, Esq., for the protester.

Janice Davis, Esq., Davis & Steele, for American K-9 Interdiction, LLC, an intervenor.

Clarence D. Long, III, Esq., Department of the Air Force, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly found awardee's technical proposal acceptable while finding protester's unacceptable, where record shows agency reasonably found material differences in the firms' proposed staffing.
 2. Agency's alleged unduly favorable evaluation of awardee's proposal under past performance factor did not prejudice protester, and thus does not provide a basis for sustaining its protest, where record shows that protester's proposal was found technically unacceptable, making protester ineligible for award.
 3. Protest allegation that awardee enjoyed unfair competitive advantage by having made a contingent offer of employment to a government employee performing some of the services being solicited is denied where record contains no evidence that the government employee either participated in preparing the solicitation or had access to procurement sensitive information.
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DECISION

Main Building Maintenance, Inc. (MBM) protests the award of a contract to American K-9 Interdiction, LLC (AK-9) under request for proposals (RFP) No. F41636-02-R-0008, issued by the Department of the Air Force for animal caretaker and kennel management services at Lackland Air Force Base (AFB). MBM asserts that the agency miscalculated proposals in arriving at its award decision and that AK-9 had an improper competitive advantage.

We deny the protest.

The solicitation contemplated the award of a requirements-type contract for a base period, with four 1-year options, to perform animal caretaker services (including feeding, grooming, exercising, bathing, tracking and processing of military working dogs (MWD), and veterinarian clinic caretaker services), as well as kennel care and operations at Lackland AFB.

The RFP divided the requirement into six contract line items (CLINS) for each performance period. The first two CLINS, for kennel care management and veterinary processing, were to be priced on a monthly lump-sum basis, while the remaining four CLINS were to be priced on the basis of graduated monthly levels of service. In this latter regard, for example, the grooming and exercising CLIN included four subCLINS for different levels of service; the first subCLIN for 1-3,000 grooming and exercising sessions per month, the second for 3,001-4,200 sessions, the third for 4,201-5,400 sessions, and the fourth for 5,401-8,520 sessions. The solicitation also stated a midpoint for each of the levels of service, as well the probability that the services would be required at the various stated levels. The grooming and exercise CLIN may be summarized as follows:

CLIN	Probability	Range	Midpoint
SubCLIN 01	3%	1-3,000	1,500
SubCLIN 02	70%	3,001-4,200	3,601
SubCLIN 03	25%	4,201-5,400	4,801
SubCLIN 04	3%	5,401-8,520	6,961

Offerors were required to enter a unit price for the service in question, which would be multiplied by both the midpoint quantity and the probability of each service level to arrive at an extended price for each of the subCLINS; these extended prices then were totaled to arrive at an estimated monthly price for each CLIN for each performance period. In this manner, the agency was conveying its best estimate of the level of effort that would be required during contract performance.

For evaluation purposes, the RFP contemplated a two-step process. First, proposals were to be evaluated for technical acceptability under a single criterion, mission capability, which was further divided into two subelements, organization/personnel and quality control. RFP at 35. Proposals were rated either technically acceptable, reasonably susceptible of being made technically acceptable or technically unacceptable under each of the subelements. In order for a proposal to be considered technically acceptable, it had to be rated acceptable under both subelements. Second, proposals deemed technically acceptable were to be evaluated and assigned a performance confidence rating--exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, or unsatisfactory/no confidence--based on past performance. RFP at 37-38. The agency would make a "best value" source selection decision considering past performance and price, with past performance significantly more important than price. RFP at 36.

The agency received three proposals, including MBM's and AK-9's (the third proposal is not relevant here). After an initial evaluation, the agency rated the protester's proposal technically unacceptable under both the organization/personnel and quality control subelements. Agency Report (AR), exh. 18, MBM Initial Evaluation Materials. AK-9's proposal was rated reasonably susceptible of being made acceptable under the organization and personnel subelement and acceptable under the quality control subelement, resulting in an overall rating of reasonably susceptible of being made acceptable. AR, exh. 18, AK-9 Initial Evaluation Materials. The agency was concerned about the adequacy of both firms' proposed staffing, and also was concerned about the adequacy of the protester's quality control plan. The agency also was concerned that AK-9's proposed price appeared excessive and possibly indicative of a miscalculation by the firm. Accordingly, the agency engaged in discussions with both firms and reevaluated proposals after receiving proposal revisions.

In its reevaluation, the agency rated the awardee's proposal technically acceptable under both subelements, and the protester's unacceptable under both subelements. AR, exh. 18, Final Evaluation Materials. Thereafter, the agency evaluated the past performance information for AK-9 and assigned it a performance confidence rating of very good/significant confidence. The agency did not rate MBM's past performance because its proposal had been found technically unacceptable and thus was not eligible to be considered further. The record also shows that AK-9 significantly reduced its price in its final proposal revision (the firm had apparently made calculation errors in its initial proposal and its revised proposal corrected those errors, which had been drawn to the firm's attention during discussions); the agency found its final price reasonable and realistic for the requirement. On the basis of these evaluation results, the agency made award to AK-9, concluding that its proposal offered the best overall value to the government.

TECHNICAL AND PRICE EVALUATION

MBM raises several assertions relating to the propriety of the agency's evaluation. Our review is limited to determining whether the agency's judgment in evaluating proposals was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Ostrom Painting and Sandblasting, Inc., B-285244, July 18, 2000, 2000 CPD ¶ 132 at 4. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4. Based on our review of the record, we find that the agency's evaluation of proposals was reasonable. We discuss our conclusions in detail below.

Adequacy of Proposed Staffing

MBM asserts that the agency miscalculated AK-9's proposal in the area of its proposed staffing. In this regard, the record shows that, after performing its initial evaluation, the agency had some reservation relating to the adequacy of AK-9's proposed staffing level for purposes of performing the solicitation's grooming and exercise requirements. Consequently, it asked AK-9 during discussions to demonstrate how its proposed staffing was adequate to meet those requirements. AR, exh. 18, AK-9 Evaluation Materials at 3. (The record shows that the agency had the same concern with respect to the MBM proposal. Consequently, it asked MBM an identical discussion question.) In response, AK-9 provided detailed calculations and narrative materials explaining why its proposed staffing of [deleted] full-time equivalents (FTE) was adequate to meet the requirements of the solicitation. Using the grooming and exercising CLIN to illustrate the adequacy of its staffing, AK-9 explained how it calculated the number of grooming and exercise sessions required per week based on the number of dogs to be groomed. AK-9 then calculated the approximate amount of time each session would take, and showed how it determined its proposed staffing based on these calculations. AR, exh. 21, Letter of Dec. 23, 2002, at 2-5. (In contrast, MBM did not provide any details relating to how it arrived at its staffing estimate. The protester proposed to accomplish the requirement using 42 FTEs, which the agency ultimately found technically unacceptable.)

The protester seems to argue that AK-9's proposed staffing is inadequate because it is based on calculations that focus on the midpoint of the most likely service level (3,601 grooming sessions per month) without taking into consideration the solicitation's higher service level ranges; in effect, MBM appears to assert that AK-9's calculations are based on performing fewer grooming and exercise sessions than contemplated by the RFP.

This argument is without merit. First, the agency reasonably found that MBM's proposed staffing was inadequate to perform the requirement. As noted, MBM proposed to perform the requirement using only 42 FTEs, compared to the [deleted] proposed by AK-9. Despite being given an identical discussion question relating to the adequacy of its proposed staffing, MBM did not present any calculations or explanation in support of its proposal, stating instead only that, "[b]ased on the current data available and the current bid schedule estimated quantities, MBM is proposing 42.08 FTEs." AR, exh. 22, MBM Technical Proposal, at 5. In evaluating MBM's response, one of the agency's evaluators independently performed calculations similar to those presented in the AK-9 proposal (discussed below), arriving at the conclusion that a minimum of 51 FTEs would be required for MBM to accomplish the requirements as estimated in the RFP. AR, exh. 18, MBM Revised Evaluation Materials, at 27-28. In the final analysis, the agency evaluators were not persuaded that MBM understood the requirements of the contract or had proposed sufficient staffing to meet all of the solicitation's tasks, and therefore assigned the

proposal a final rating of unacceptable in this area. AR, exh. 18, MBM Revised Evaluation Materials, at 2, 8-9, 15, 19-20, 24-28. MBM does not assert that the agency's evaluation conclusion is either incorrect or unreasonable, and we see nothing unreasonable in the agency's methodology or conclusion.

We are at a loss to understand MBM's position that AK-9's proposed staffing was inadequate in light of the fact that MBM proposed [deleted] fewer FTEs than AK-9. In any event, we conclude that the agency reasonably found AK-9's proposed staffing adequate. As discussed above, in response to the agency's discussion question, AK-9 presented detailed calculations based on performing 3,601 grooming and exercise sessions per month (900 per week). As noted, AK-9 based its staffing calculations on performing 3,601 sessions because this was the midpoint for the 3,001-4,200 service range, which the RFP indicates was the most likely range of performance. AK-9's proposal states: "We based the number of manhours/personnel required for grooming and exercising on CLIN 5AB--which indicated the highest probability factor [70 percent probability of performance in this range] pertaining to grooming and exercising." AR, exh. 21, Letter of Dec. 23, 2002, at 2.¹ The firm explained how it could perform the 900 grooming and exercise sessions per week with its proposed staffing.

The agency accepted AK-9's explanation, and concluded that its proposed staffing would be adequate. AK-9's methodology appears logical on its face, and is similar to the method used by the agency to evaluate the adequacy of MBM's staffing. In particular, we see nothing unreasonable in AK-9's reliance on the most likely service level in calculating its staffing; MBM has presented no information establishing that AK-9's proposed staffing in fact is not adequate, and has not shown that it calculated its own staffing in a different manner, to its competitive prejudice (again, it is not clear how MBM could have been prejudiced in this regard, since its staffing level was substantially lower than AK-9's). See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Under these circumstances, there is no basis for questioning the agency's determination.

¹ AK-9 divided 3,601 by 4 to arrive at 900 required weekly sessions. MBM maintains that, because AK-9 divided the monthly total of 3,601 by 4 instead of 4.34 (the actual number of weeks in a month on an annual basis), its proposal effectively offers to perform the contract for only 48, instead of the required 52, weeks a year. However, since AK-9's alleged mathematical error consisted of dividing 3,601 by too small a number, the effect was actually to have AK-9 calculate its staffing based too high a number of grooming and exercise sessions (900 versus 829). Thus, to the extent that the proposal contains a mathematical error, the error resulted in AK-9's overstating its proposed staffing.

Price Evaluation

In a related argument, MBM maintains that the agency improperly failed to evaluate the realism of AK-9's proposed price and asserts that, had the agency done so, it would have discovered that the firm's proposed price was dramatically understated because it was based on an inadequate level of effort. According to the protester, the agency will reimburse AK-9 for all feeding and grooming and exercise sessions, and since its proposal was based on a lower level of effort (as noted, the protester asserts, for example, that AK-9 based its pricing on performing only 3,601 grooming and exercise sessions per month rather than the maximum possible number of grooming and exercise sessions), the agency's evaluation failed to take into consideration the true cost of contract performance.

The protester's argument is based on a flawed premise, namely, that the offerors' estimated pricing was determined through calculations based on some--but not all--of the units for each requirements-type CLIN. In fact, the agency's price evaluation methodology took into account, in a weighted manner, all possible levels of service. This is precisely what the RFP required it to do. To the extent that the protester is challenging the method of evaluation outlined in the RFP or the accuracy of the agency's estimates of the levels of service to be acquired, it is an untimely challenge to the terms of the RFP. See Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1) (2003).

Quality Control Plan

MBM asserts that the agency improperly found AK-9's proposal acceptable under the quality control subelement. The primary focus of MBM's allegation is its assertion that the AK-9 quality control plan did not specifically list all of the service delivery items to be provided under the contract, and therefore was incomplete. MBM further asserts that the AK-9 quality control plan provides that [deleted] percent of the quality control inspectors' time will be left as "time available" to perform monthly (as opposed to daily) quality inspections; MBM asserts that this is unacceptable because, if AK-9 claims during contract performance that no time is available, these monthly inspections will not be performed.

MBM misinterprets the AK-9 proposal. First, the proposal specifically offers to implement policies and procedures to cover all performance aspects of the contract. The proposal states in this regard as follows:

American K-9 and its subcontractors (where appropriate) will provide the following personnel and implement the following policies and procedures regarding the implementation and execution of Quality Control (QC) over all aspects concerning the Statement of Work and Service Delivery Summary as outlined in the . . . solicitation.

AK-9 Proposal, Quality Control Plan, at 1 (emphasis supplied). The quality control plan then goes on to provide details relating to the [deleted] employees designated as quality control inspectors, their hiring and training, and eventual deployment on the contract. *Id.* at 2. Thereafter, the plan sets forth a regimen of routine random inspections that will be conducted by the quality control inspectors in order to ensure quality control for each of the solicitation's service delivery items. (For example, the proposal provides that [deleted] percent of all grooming and exercise sessions will be inspected on a daily basis.) *Id.* at 2-3. Thus, contrary to the protester's assertion, the agency reasonably determined that AK-9's quality control plan adequately addressed the service items.

The plan also goes on to describe the firm's inspection methodology, as well as its performance monitoring and inspection systems. AK-9 Proposal, Quality Control Plan, at 6-8. The plan includes a quality standards definitions section, as well as a statement of animal facility quality standards. *Id.* at 8-10. Finally, the plan includes examples of the firm's quality control checklists, as well as a representative quality control inspection report. *Id.* at 5-6, 11. On its face, AK-9's quality control plan appears complete, and MBM has not shown otherwise.

As for MBM's remaining argument, we do not agree with its interpretation of the proposal statement that, in addition to time spent performing the daily inspection regimen, [deleted] percent of the quality control inspectors' time will be left open as "time available" for the quality control inspectors to perform monthly (as opposed to daily) inspections. *Id.* at 3. There is nothing in this language to support MBM's view that the inspectors will perform the monthly inspections only if time is available, and that AK-9 was essentially qualifying its offer. Rather, we think the agency reasonably read this statement as indicating, simply, the amount of its inspectors' time AK-9 believed would be needed to perform the monthly inspections. We conclude that the agency reasonably found the plan technically acceptable.²

² MBM also suggests that AK-9's proposal should have been rated unacceptable under the quality control subelement because the firm did not submit a complete safety plan. The record shows that, during the site visit, the agency advised all offerors that it was in the process of revising the Air Force safety plan for military working dogs. The Air Force never issued a solicitation amendment to include a revised Air Force safety plan, and the awardee's proposal reiterates these facts and states that, while there was no current agency guidance, the firm understood that it would be required to adhere to subsequently-issued agency requirements. AR, exh. 21, Letter of Dec. 23, 2002, at 7-8. The protester's proposal includes a similar statement that, upon receipt of guidance from the agency, it would prepare its safety plan. AR, exh. 22, MBM Technical Proposal, at 43-44. Since the record shows that neither firm's proposal was downgraded during the reevaluation for failing to include an adequate safety plan, AR, exh. 15, Source Selection Decision Document, at 2, to
(continued...)

MBM asserts that, to the extent that the AK-9 quality control plan was found acceptable, MBM's plan also should also have been found acceptable. We need not consider this assertion since, even if MBM were correct, its proposal would still be unacceptable overall based on inadequate staffing, as discussed above.

PAST PERFORMANCE

MBM asserts that the agency erroneously assigned the AK-9 proposal a performance confidence rating of very good/significant confidence. According to the protester, neither AK-9 nor its subcontractors had relevant experience that would merit the rating assigned.

Regardless of the rating that may have been assigned the AK-9 proposal in the area of past performance, the agency's actions could not have been prejudicial to MBM. As noted, the RFP provided for a two-step evaluation--only those proposals initially found technically acceptable were evaluated in the area of past performance and included in the performance/price tradeoff. RFP at 36-39. As discussed above, the agency properly found the MBM proposal technically unacceptable for failing to propose adequate staffing. Consequently, the MBM proposal was neither eligible for evaluation in the area of past performance, nor eligible for award under the agency's performance/price best value award decision. It follows that the propriety of the agency's past performance evaluation of the AK-9 proposal could not have competitively prejudiced MBM. Since competitive prejudice is an element of every viable protest, Amcare Med. Servs., Inc., B-271595, July 11, 1996, 96-2 CPD ¶ 10 at 3; McDonald-Bradley, *supra*; Statistica, Inc. v. Christopher, *supra*, this argument provides no basis for sustaining MBM's protest.

IMPROPER COMPETITIVE ADVANTAGE

MBM asserts that AK-9 had an improper competitive advantage in connection with the acquisition because it made a contingent offer of employment to an individual who, at the time proposals were submitted, was the agency's site manager for the kennel. According to MBM, the individual in question allegedly assisted in preparing the solicitation's statement of work, and also had access to competitively useful information that it furnished to AK-9 during the course of the procurement.

We find no merit to this aspect of MBM's protest. The interpretation and enforcement of post-government employment restrictions are primarily within the ambit of the Department of Justice and the contracting agency. Our general interest

(...continued)

the extent that the agency could be said to have waived this element of the RFP, it did so for both firms; consequently this was not prejudicial to MBM.

within the confines of a bid protest is to determine whether any action by a current or former government employee may have called into question the integrity of the competition. See Protection Total/Magnum Sec., S.A., B-278129.4, May 12, 1998, 98-1 CPD ¶ 137 at 3. Specifically, we review whether an offeror may have prepared its proposal with knowledge of insider information sufficient to establish a strong likelihood that the offeror gained an unfair competitive advantage. Id. We consider whether the former government employee had access to competitively useful information, as well as whether the employee's activities with the successful offeror likely resulted in a disclosure of such information. Id. at 3-4.

The record shows that, as to MBM's first assertion--that the individual in question helped to prepare the statement of work--the protester is wrong as a factual matter. The solicitation was issued in April 2002, but the individual in question--a temporary government employee--was not employed by the agency until September 2002. Contracting Officer's Supplemental Statement, Apr. 7, 2003, at 3, and attachs. 1 and 2. The protester has offered no evidence to rebut this showing on the part of the agency, and we have no basis to find that the individual participated in preparing the statement of work.

The agency also categorically denies that the individual in question, either as part of his official duties or otherwise, had access to competitively sensitive information, such as the offerors' proposals or source selection materials generated by the agency contracting personnel. Contracting Officer's Supplemental Statement, Apr. 7, 2003, at 3. As with its other assertion, the protester has advanced absolutely no evidence to support its position, or to contradict the agency's representations. We therefore have no basis to find that the individual in question had access to procurement sensitive information that might have been competitively useful to AK-9 in the preparation of its proposal.

The protester nonetheless insists that the individual in question, by virtue of his having performed the function of kennel supervisor, would have detailed information relating to kennel operations not available to other offerors that could provide AK-9 an advantage in preparing its proposal. In this respect, the protester has submitted an affidavit prepared by another former kennel supervisor in which she provides details about the type of information that was available to her as kennel supervisor; she opines that such information would be competitively useful and represents that the same information would also have been available to the individual in question. Protester's Supplemental Comments, Apr. 21, 2003, exh. 1.

We find no basis to conclude that the individual at issue was privy to information that could have provided an improper advantage to AK-9. The type of information to which the protester's affiant refers includes records as to the number of dogs in the program and their status, and information on the number of times per week the dogs are groomed, exercised, fed and bathed. However, the type of information at issue was included in the RFP; all offerors knew the number of dogs and the frequency of

various contract activities, and all proposals were evaluated against identical quantities of contract services (for example, as discussed above, all proposals were evaluated--both for technical and price purposes--using the same number of grooming and exercise sessions). Moreover, the mere employment of a current or former government employee familiar with the type of work required--but not privy to the contents of proposals or other inside agency information--does not confer an unfair competitive advantage. Protection Total/Magnum Sec., S.A., supra, at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel